

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BRIAD RESTAURANT GROUP, LLC**

**and**

**Case No. 22-CA-165746**

**OUTTEN & GOLDEN, L.L.P.**

**RESPONDENT BRIAD RESTAURANT GROUP, LLC'S OPENING BRIEF  
TO THE NATIONAL LABOR RELATIONS BOARD**

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By Joint Motion and Stipulation of Facts, Respondent Briad Restaurant Group, L.L.C. (“Respondent” or “Briad”), the Charging Party Outten & Golden, L.L.P., (“Outten & Golden”), and Counsel for the General Counsel (the “CGC”) have submitted this matter directly to the National Labor Relations Board (the “NLRB” or the “Board”) which accepted the stipulated record and the parties’ waiver of a hearing by Order dated October 26, 2016.

### **INTRODUCTION**

The sole issue before the Board is whether, as alleged by the CGC,<sup>1</sup> Briad has violated Section 8(a)(1) of the National Labor Relations Act (the “Act”) by interfering with employees’ Section 7 rights by generally asking its new employees to sign as part of their new hire paperwork an arbitration agreement (hereinafter, the “Arbitration Agreement”) which requires employees who execute it to waive their right to maintain class and collective actions in arbitral and judicial forums with respect to those claims that are subject to arbitration under the Arbitration Agreement (hereinafter, the “Class Action Waiver”).<sup>2</sup>

For the reasons detailed below, Respondent respectfully asks the Board to reject the CGC’s contentions regarding the Arbitration Agreement and dismiss the Complaint because the Class Action Waiver is enforceable under applicable statutory law as interpreted by controlling United States Supreme Court jurisprudence and does not otherwise run afoul of the Act.

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<sup>1</sup> Outten & Golden has stipulated that it is in agreement with the position taken by the CGC.

<sup>2</sup> The arbitration agreement at issue in this proceeding is attached as Joint Exhibit 6 to the Joint Stipulation of Facts.

## **STATEMENT OF FACTS**<sup>3</sup>

### **ARGUMENT**

#### **I. The Arbitration Agreement's Class Action Waiver Must be Upheld Because No Exception to the FAA Mandate Applies.**

Section 2 of the FAA provides that private agreements to arbitrate, such as the Arbitration Agreement at issue here, are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2016). In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the seminal decision respecting the dominion of the FAA, the Supreme Court described this provision as reflecting two important principles. First, “that arbitration is a matter of contract.” *Id.* at 339 (internal quotations and citations omitted); *see also DIRECTTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (reversing state appeals court’s invalidation of class-action waiver based on failure to place arbitration contract “on equal footing with all other contracts”); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989) (noting that the “principal purpose” of the FAA is to “ensur[e] that private arbitration agreements are enforced according to their terms” and the parties are free to “specify by contract the rules under which the arbitration will be conducted.”). Second, the FAA evinces a “liberal federal policy favoring arbitration.” *Concepcion*, 563 U.S. at 339 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (“The [FAA] reflects an emphatic federal policy in favor of arbitral dispute resolution.”) (internal quotations and citations omitted). “Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their

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<sup>3</sup> In the interest of brevity, Respondent respectfully refers the Board to the Joint Stipulation of Facts for background information on the parties to and procedural posture of this matter.

disputes[.]” *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994). This policy applies with equal force in the employment context. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

In keeping with the “liberal federal policy favoring arbitration,” the Supreme Court has made clear that under the FAA, arbitration agreements must be “enforce[d] . . . according to their terms,” unless one of the following exceptions applies: (1) the FAA savings clause is triggered, or (2) the FAA is overridden by a “contrary congressional command.” *Concepcion*, 563 U.S. at 339; *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). Since neither exception applies to the Class-Action Waiver set forth in the Arbitration Agreement, Supreme Court precedent mandates that it is lawful.

**a. The FAA’s “Saving Clause” Does Not Offer an Exception to Class Waivers Because Class and Collective Actions Are Procedural Mechanisms, Not Substantive Rights.**

The FAA’s saving clause provides that arbitration provisions may be struck down “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The Supreme Court in *Concepcion* unambiguously held that the “saving clause” does not apply to class-action waivers. 563 U.S. at 344. While the “saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability,” *Id.* at 339 (internal quotations and citation omitted), the Supreme Court concluded that a ban on class waivers does not fall under the purview of these traditional contract defenses. *Id.* at 343-44. Indeed, such a ban would “stand as an obstacle to the accomplishment of the FAA’s objectives.” *Id.* at 343.

Despite the Supreme Court’s unambiguous ruling in *Concepcion*, the NLRB has tried to use the FAA’s “saving clause” to argue that the FAA permits striking down class-action waivers

under the guise of preserving “substantive” Section 7 rights. *See In Re D. R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)), for the proposition that the FAA does not permit parties to “forgo the substantive rights afforded by ... statute,” despite the fact that *Gilmer* upheld class waivers as non-substantive rights in the ADEA context), *reversed by, D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 355 (5th Cir. 2013).

In response, Circuit Court of Appeal have found that class mechanisms are *procedural*, not substantive, and overturned Board decisions holding otherwise. *See D.R. Horton, Inc.*, 737 F.3d at 359-60 (holding that no substantive right to class or collective proceedings exists under NLRA and that a contrary holding would frustrate the FAA); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015) (citing its prior decision in *D.R. Horton, Inc.* and again overturning the Board and holding that “‘use of class action procedures ... is not a substantive right’ under Section 7 of the NLRA”)(citation omitted); *see also Deposit Guar. Nat’l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.”);<sup>4</sup> *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (proceeding collectively under the FLSA is a matter of procedure, not a substantive right); *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp. 2d 784, 788 (E.D. Ark. 2012) (“collective proceedings under FLSA are a matter of procedure, not substance”). *Accord, Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002).<sup>5</sup>

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<sup>4</sup> Fed. R. Civ. P. 23 provides for the class action mechanism and sets forth the procedures for same.

<sup>5</sup> *But see Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1160 (7th Cir. 2016) (finding right to collective action to not merely be procedural in nature); *Morris v. Ernst & Young LLP*, 834 F.3d 975, 998 (9th Cir. 2016) (finding same). As noted, however, the *Lewis* and *Morris* courts’

Most recently, a United States District Court for the District of New Jersey — in which state Briad is headquartered — explicitly rejected the Board’s position that class waivers violate employees’ Section 7 rights and held that such waivers are enforceable because they are “merely a procedural device that can be contractually waived by the parties without infringing upon [an employee’s] statutory rights.” *Kobren v. A 1 Limousine Inc.*, No. 15-516-BRM-DEA, 2016 U.S. Dist. LEXIS 154012, at \*12 (D.N.J. Nov. 7, 2016). *See also Bekele v. Lyft, Inc.*, No. 15-11650-FDS, 2016 U.S. Dist. LEXIS 104921, at \*61 (D. Mass. Aug. 9, 2016) (holding that “it is clear from the text of the NLRA that an employee’s ability to bring a class action against his employer under Rule 23 is not a substantive right protected by the statute. Rather—just as it is for every other type of plaintiff—it is a procedural vehicle by which an employee may seek to enforce a substantive right”).

Simply stated, *Concepcion* and related case law are clear that the “saving clause” does not apply to class-action waivers.

**b. There is No Congressional Command for Class Procedures that Overrides the FAA’s Mandates.**

The Supreme Court offered a narrow, second exception to the FAA in *CompuCredit Corporation*, 132 S. Ct. at 669. There, the Court held that courts must enforce arbitration agreements according to their precise terms unless “the FAA’s mandate has been overridden by a

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decisions go against the vast majority of courts that have decided on this issue. Moreover, even the *Lewis* court acknowledged in its decision that the class/collective action mechanism is a procedural mechanism, referring to it as a “collective *process*”. *Lewis*, 823 F.3d at 1161 (emphasis added). Where the *Lewis* and *Morris* courts erred, but virtually every other court to consider the issue has gotten right, is that the corollary of the premise that a class mechanism is a process and not a substantive right is that class procedures may be waived by contract. *See Gilmer*, 500 U.S. at 26, 32. The FAA, therefore, mandates the enforcement of such waivers. *See e.g., D.R. Horton, Inc.*, 737 F.3d at 357. *See also Patterson v. Raymours Furniture Co.*, No. 15-2820-cv, 2016 U.S. App. LEXIS 16240 (2d Cir. Sept. 2, 2016); *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 295-98 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-53 (8th Cir. 2013).

contrary congressional command.” *Id.* (internal quotations and citation omitted). The *CompuCredit* Court also warned, in no uncertain terms, that if a statute “is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms.” *Id.* at 673. Again, any attempt to apply this exception to the NLRA and class waivers has been tried and found wanting.

Nothing in the NLRA’s text or legislative history suggests that Congress intended to ban class-action waivers in arbitration agreements. Section 7 does not even use the word “arbitration,” nor does it mention the right to particular procedural options to resolve legal claims. As the Fifth Circuit explained in *D.R. Horton*:

[G]eneral language is an insufficient congressional command, as much more explicit language has been rejected in the past. Indeed, the text does not even mention arbitration. By comparison, statutory references to causes of action, filings in court, or allowing suits all have been found insufficient to infer a congressional command against application of the FAA.

737 F.3d at 360-61 (finding no “congressional command against application of the FAA” to class-action waivers based on review of the NLRA’s text and legislative history); *see also Sutherland*, 726 F.3d at 297-98, n.8; *Owen*, 702 F.3d at 1055; *Vilches v. Travelers Cos., Inc.*, 413 F. App’x 487, 494 (3d Cir. 2011); *Carter*, 362 F.3d at 298; *Adkins*, 303 F.3d at 503; *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App’x 618, 619 (9th Cir. 2001); *Carey v. 24 Hour Fitness USA, Inc.*, No. H-10-3009, 2012 U.S. Dist. LEXIS 143879, at \*5 (S.D. Tex. Oct. 4, 2012); *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012) (“Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act”); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012) (“Because Congress did not expressly provide that it was overriding any provision in the FAA,

the Court cannot read such a provision into the NLRA and is constrained by *Concepcion* to enforce the instant agreement according to its terms”).

Like the “saving clause,” any “congressional intent” argument is inconsistent with settled Supreme Court precedent and a myriad of lower court decisions. Since the NLRA “is silent on whether claims under [it] can proceed in [arbitral form], the FAA requires the arbitration agreement be enforced according to its terms.” *Compucredit*, 132 S. Ct. at 673.

## **II. Controlling Jurisprudence Mandates that the Board Uphold Class Waivers Contained in Arbitration Agreements.**

The Supreme Court of the United States has consistently upheld arbitration provisions, such as Briad’s, under which parties waive their right to participate in class or collective actions. See *DIRECTTV*, 139 S. Ct. 463; *Concepcion*, 563 U.S. at 339; *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *CompuCredit Corp.*, 132 S. Ct. 665; and *Gilmer*. 500 U.S. at 35.

Indeed, Circuit Courts have overturned decisions that invalidate class waivers. For example, in *D.R. Horton, Inc. v. N.L.R.B.*, the Fifth Circuit set aside the NLRB’s decision to invalidate an arbitration agreement with a class waiver clause. There, the Court concluded that neither the NLRA, its legislative history, nor any policy consideration contain any congressional command to override the FAA. 737 F.3d at 360. Thus, the *D.R. Horton* Court held that an individual’s right to bring a class or collective action is properly waivable in an arbitration agreement. *Id.* at 362. Further, the Court noted: “Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB’s rationale, and held arbitration agreements containing class waivers enforceable.” *Id.* (citations to Second, Eighth and Ninth Circuit cases omitted).

In October 2015, the Fifth Circuit reinforced its *D.R. Horton* holding. *See Murphy Oil Usa, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014), *reversed by, Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). The Court did not even find it necessary to “repeat its analysis[.]” 808 F.3d at 1018.<sup>6</sup> However, the Fifth Circuit explained that the NLRB was constrained to follow controlling law and only avoided a contempt holding “to restrain it from continuing its nonacquiescence practice with respect to th[e] court’s directive” because it could claim confusion as to which Circuit Court the defendant might have appealed. *Id.* (internal quotation omitted). The Fifth Circuit further admonished: “The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.” *Id.* at 1021. *See also Empls. Res. v. NLRB*, No. 16-60034, 2016 U.S. App. LEXIS 19619 (5th Cir. Nov. 1, 2016) (citing to its prior decisions in *D.R. Horton* and *Murphy Oil* in denying enforcement of the Board’s application to enforce its order directing employer-respondent to rescind its arbitration agreement containing a class waiver).

In June 2016, the Eighth Circuit reversed the Board and held that an employer “did not violate section 8(a)(1) by requiring its employees to enter into an arbitration agreement that included a waiver of class or collective actions in all forums to resolve employment-related disputes.” *Cellular Sales of Mo., LLC*, 824 F.3d at 776. *See also Owen*, 702 F.3d at 1053-55 (rejecting the Board’s position in *D.R. Horton* and joining “fellow circuits that have held that

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<sup>6</sup> Notably, the NLRB’s *Murphy Oil* decision and many which followed it have been met with vocal dissent. *See Murphy Oil Usa, Inc.*, 361 NLRB No. 72 (quoting the Supreme Court and explaining “The Board has not been commissioned to effectuate the position of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives”) (Member Miscimarra, dissenting) (“This stance creates a clear conflict not only with controlling Supreme Court precedent ... but also with every Federal court that has granted one of the motions to compel arbitration the majority today finds unlawful”) (Member Johnson, dissenting); *Bristol Farms and Konny Renteria*, 363 NLRB No. 45 (Nov. 25, 2015) (Member Miscimarra, dissenting); *Price-Simms, Inc.*, 363 NLRB No. 52 (Nov. 30, 2015) (Member Miscimarra, dissenting).

arbitration agreements containing class waivers are enforceable in claims brought under the FLSA”).

Likewise, the Second Circuit has on several occasions — including as recently as September 2016 — explicitly rejected the Board’s conclusion in *D.R. Horton* that class-action waivers violate the NLRA. *See Sutherland*, 726 F.3d at 297-98, n.8 (“[W]e decline to follow the decision in *D.R. Horton*. Even assuming that *D.R. Horton* addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning.”) (internal quotations and citation omitted); *Patterson*, 2016 U.S. App. LEXIS 16240, at \*7-8 (enforcing class waiver and citing to its prior decision in *Sutherland* where it “unquestionably” rejected the NLRB’s analysis “and embraced the Eight Circuit’s position in *Owen*”).

To the extent there remains any ambiguity as to how it should rule in this matter, the Board need only look to the legion of other circuit and district courts that have almost universally upheld class-action waivers:

- **1<sup>st</sup> Circuit:** *Bekele*, 2016 U.S. Dist. LEXIS 104921, at \*61.
- **2<sup>nd</sup> Circuit:** *Patterson*, 2016 U.S. App. LEXIS 16240, at \*7-8; *Sutherland*, 726 F.3d at 297-98 n.8; *Parisi v. Goldman Sachs & Co.*, 710 F.3d 483 (2d Cir. 2013); and *LaVoice v. UBS Fin. Servs., Inc.*, No. 11 Civ. 2308 (BJJ)(JLC), 2012 U.S. Dist. LEXIS 5277, \*20 (S.D.N.Y. Jan. 13, 2012).
- **3<sup>rd</sup> Circuit:** *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221 (3d Cir. 2012); *Vilches*, 413 F. App’x 487; *Litman v. Cellco P’ship*, 655 F.3d 225 (3d Cir. 2011); *Kobren*, 2016 U.S. Dist. LEXIS 154012; and *Brown v. Trueblue, Inc.*, No. 1:10-CV-0514, 2012 U.S. Dist. LEXIS 52811 (M.D. Pa. Apr. 16, 2012).
- **4<sup>th</sup> Circuit:** *Adkins*, 303 F.3d at 506.
- **5<sup>th</sup> Circuit:** *Emplrs. Res.*, 2016 U.S. App. LEXIS 19619; *Carter*, 362 F.3d at 298; *D.R. Horton, Inc.*, 737 F.3d 344; *Murphy Oil USA, Inc.*, 808 F.3d 1013; and *Carey*, 2012 U.S. Dist. LEXIS 143879, at \*5.
- **8<sup>th</sup> Circuit:** *Cellular Sales of Mo., LLC*, 824 F.3d 772; *Owen*, 702 F.3d at 1054 and *Delock*, 883 F. Supp. 2d at 789.

- **11<sup>th</sup> Circuit:** *Caley*, 428 F.3d at 1378; *De Oliveira v. CitiCorp. N. Am., Inc.*, No. 8:12-cv-251-T-26TGW, 2012 U.S. Dist. LEXIS 69573 (M.D. Fla. May 18, 2012); and *Palmer v. Convergys Corp.*, No. 7:10-cv-145 (HL), 2012 U.S. Dist. LEXIS 16200 (M.D. Ga. Feb. 9, 2012).<sup>7</sup>

In short, any ruling that rejects the validity of Briad’s class-action waiver would directly conflict with controlling precedent set by the Supreme Court of the United States. Accordingly, the Arbitration Agreement – and the class-action waiver that it contains – is unquestionably lawful and enforceable.

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<sup>7</sup> As previously noted, against the overwhelming weight of authority, the Seventh and Ninth Circuits have held that an arbitration agreement with a class action waiver violated the Act. *See Lewis*, 823 F.3d 1147; *Morris*, 834 F.3d 975.

## **CONCLUSION**

For all the foregoing reasons, the Complaint should be dismissed in its entirety with prejudice.

Dated: New York, NY

December 9, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of December, 2016, a true and correct copy of the forgoing Brief was filed with the Board via the Board's electronic filing system, and served by electronic mail upon the following:

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